No. 114

In the Supreme Court of the United States

October Term, 1941.

J. T. McCARTHY, JR., DOING BUSINESS AS HERCULES SUPPLY COMPANY, AND G. L. MEHOLIN,
Petitioners,
vs.
H. C. WYNNE AND AMERICAN EXCHANGE BANK OF HENRYETTA, OKLAHOMA, *Respondents.*

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

Brief for Respondents in Opposition.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. 1279

J. T. McCARTHY, JR., DOING BUSINESS AS HERCULES SUPPLY COMPANY, AND G. L. MEHOLIN,
Petitioners,
vs.
H. C. WYNNE AND AMERICAN EXCHANGE BANK OF HENRYETTA, OKLAHOMA, *Respondents.*

BRIEF *for* RESPONDENTS *in* OPPOSITION

Opinions Below.

The first opinion of the Circuit Court of Appeals is reported in 97 F. (2d) 964. The second opinion of the Circuit Court of Appeals is reported in 126 F. (2d) 620 and is found in the transcript of record (NR) at pages 179-184.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 26, 1942 (NR 184). A petition for rehearing was filed by the petitioners on March 28, 1942 (NR 235), and said petition was denied on April 14, 1942 (NR 236). A petition for a writ of *certiorari* was filed June 4, 1942. Juris-

diction of the court is invoked under Section 240 of the Judicial Code, as amended (Title 28, Sec. 347 (a), U. S. C. A.) and by Rule 38, Sec. 5 (b) of the Rules of this court, as amended.

Statement of the Case.

Petitioners' statement of the facts of this case is not regarded by respondents as being accurate and complete. It is thought that a clearer view of the facts may be presented by a complete statement rather than by endeavoring to correct and supplement the statement made by petitioners.

The Facts:

In July, 1924, respondent H. C. Wynne was appointed liquidating agent of the Colonial Supply Company, an Oklahoma corporation, hereinafter referred to as "Colonial," engaged in the business of selling oil well supplies. It operated stores at Henryetta and Wewoka, Oklahoma.

In December, 1924, negotiations were entered into between Wynne and McCarthy for the purchase by the latter of Colonial's stock of oil well supplies. A written contract was entered into, dated December 19, 1924, executed January 5, 1925 (OR 57), by the terms of which it was agreed that Colonial would ship to McCarthy the entire stock of oil well supplies of Colonial located at Henryetta and Wewoka, Oklahoma; that McCarthy should purchase 65% of the materials and pay therefor 75% of the factory prices; that the remaining 35% of the material should be held by McCarthy and be sold in the usual course of business, and Colonial should be paid 85% of the factory price of the goods as and when sold. The purchase price of the 65% of the goods was to be paid in installments—50% upon delivery, 25% in sixty days, and 25% in ninety days. It was agreed

that the goods to be purchased by McCarthy and the goods to be held on consignment should be designated and agreed upon at the time said materials were removed from the cars at Wortham, Texas. The contract contained other provisions not deemed material here. The contract was assigned by Colonial to Wynne (OR 60).

The supplies were loaded in freight cars and shipped to McCarthy at Wortham and Vernon, Texas, as requested by him, in December, 1924, and January, 1925 (OR 60). As the materials were being unloaded at Wortham, Wynne and McCarthy orally agreed that McCarthy might defer the election of goods to be purchased until a later date (OR 62, 117). Upon completion of the unloading and checking of the last car, Wynne wrote McCarthy on February 10, 1925, requesting an appointment to finish the matter (OR 118), but McCarthy requested delay (OR 118), and despite the insistence and repeated requests of Wynne (OR 126-130), he was unable to get an audience with McCarthy until May 15th of that year (OR 131); and it was September 29, 1925, before McCarthy furnished Wynne with any kind of statement of selection of the goods to be purchased (OR 64). Even then the statement was designated as temporary (Plaintiff's Exhibit 27, OR 146). In the meantime, McCarthy was selling the goods (Finding XIII, OR 64). On December 22, 1925, McCarthy sent Wynne a statement of consigned stock (Plaintiff's Exhibit 32, OR 150), and on January 7, 1926, McCarthy sent Wynne a statement of the goods which he elected to purchase (Plaintiff's Exhibit 36, OR 152). These two statements did not account for all of the goods received by McCarthy and were not accepted by Wynne (OR 64, 155).

The factory prices of the goods were not determined by

either party for some time after they were shipped. In the meantime, the question arose as to how much was due under the terms of the contract at delivery, and later, the sixty and ninety day payments. Estimates were resorted to, based upon an inventory dated August 4, 1924, but no agreement was ever reached (OR 131, 189). When Wynne completed pricing the goods, the total exceeded $39,000.00, whereupon McCarthy declined to purchase 65%, claiming that the contract obligated him to purchase only 65% of the estimated amount of goods in the stock which, according to McCarthy, was $24,206.77 (Finding XI, OR 64; Plaintiff's Exhibit 8, OR 121, 122). Several conferences were had and numerous letters and telegrams were exchanged both with respect to the price basis upon which the current payments should be made and upon McCarthy's contention that he should not purchase 65% of the total amount of goods delivered, but no agreement was ever reached (OR 189).

In the meantime, payments were made by McCarthy totaling $11,800.83 (OR 119). It is significant that the amount paid is the exact amount payable by McCarthy for the goods to be purchased based on his claim that he was only required to purchase 65% of the goods that were estimated to be in the stock regardless of the goods actually delivered. In addition to the payments made by McCarthy, he shipped to the order of Wynne goods of the factory price of $966.71 (OR 66). No other sum has ever been paid and no other goods have ever been returned to Wynne.

Suit Is Filed:

On the 16th day of March, 1933, this suit was instituted by H. C. Wynne, as plaintiff, against J. T. McCarthy, Jr., and G. L. Meholin, as defendants, in the District Court of

Oklahoma County, Oklahoma.* The cause was removed to the United States District Court by the defendants on the ground of diversity of citizenship, plaintiff being a citizen of Oklahoma and the defendants being citizens of Texas (OR 14-19). After the trial, but before judgment, the American Exchange Bank intervened, claiming an assignment from Wynne as collateral security, and judgment was rendered jointly in favor of Wynne and the bank (OR 108, 111). By this suit it was sought to subject certain property in Oklahoma County, Oklahoma, to the payment of the claim of Wynne against McCarthy. Some of the property stood in the name of Meholin, McCarthy's bookkeeper, and for that reason Meholin was made a party (OR 10). Service was had upon the defendants outside the State of Oklahoma (OR 12-13), and, of course, unless defendants entered their appearance, no personal judgment could be rendered.

Agreement Waiving Jury Trial:

Subsequently another suit was filed in the Superior Court of Okmulgee County, Oklahoma, by Wynne against McCarthy, and personal service of summons was had on McCarthy in that county. The case was removed to the United States District Court for the Eastern District of Oklahoma. A motion to remand each of the cases was filed by Wynne. Thereupon an agreement was entered into between Wynne and McCarthy (NR 8), wherein it was agreed

*A suit was filed by Wynne against McCarthy in the District Court of Tarrant County, Texas, in January, 1931. The cause was referred to a Special Master on the court's own motion, evidence was heard, and a report made by the Master to the Court, to which McCarthy excepted and demanded a jury trial (OR 164). Under the statutes of Texas this demand for jury trial rendered the trial before the Special Master nugatory. *San Jacinto Oil Co.* v. *Culberson*, 100 Tex. 462, 101 S. W. 197. It was thought by counsel for Wynne that the matter was of such a complicated nature that it could not be tried to a jury, where, as in Texas, trials are by special issues submitted to the jury, upon which all twelve jurors are required to agree.

that the case pending in the Eastern District of Oklahoma should be dismissed; that Wynne's motion to remand the case pending in the Western District of Oklahoma should be withdrawn; that McCarthy should enter his general appearance in the case pending in the Western District of Oklahoma; that both parties should waive a jury and that the case should be referred to a Special Master to hear the evidence, make findings of fact and conclusions of law in the manner authorized by the federal equity rules. The agreement covered other details not deemed important here.

The Issues:

Wynne's petition alleged that by reason of the fraudulent conduct of McCarthy therein detailed, McCarthy was estopped to claim that he had selected any portion of said merchandise for purchase, and that he should be deemed to hold the entire stock on consignment for sale for the use and benefit of Wynne, and that the amount paid by McCarthy should be considered as a credit on the consigned property; that McCarthy was not entitled to a discount, but should be required to account for the full factory price of all the property received (OR 7-8).

The petition alleged that there was delivered to McCarthy goods of the factory prices and value of $35,436.95 (OR 3); that payments totaling $11,800.83 had been made (OR 3), and that McCarthy was entitled to credit in the amount of $931.26 for goods delivered by McCarthy to the order of Wynne (OR 8). The petition prayed: for an attachment and garnishment against the property of McCarthy and that certain property standing in the name of Meholin, described in the petition (OR 10), be subjected to the payment of the claim against McCarthy; for discovery; and that McCar-

thy be required to account for all the merchandise received by him (OR 11).

By an amendment it was alleged that by the terms of the contract between Colonial and McCarthy, McCarthy was obligated to sell and/or to pay Colonial within a reasonable time 85% of the factory price of all goods held on consignment; that Wynne, being unable to secure a satisfactory accounting from McCarthy, on or about the 6th day of December, 1930, requested that he be allowed to recover possession of any unsold property; that McCarthy refused; that thereupon McCarthy became obligated and bound to pay Wynne 85% of the factory price of any goods remaining unsold, if he was not theretofore so obligated (OR 29).

McCarthy answered, alleging that he had overpaid Wynne for the goods received and claiming additional credit on account of transactions arising out of the contract in question and praying judgment against Wynne in the amount of $2,946.03 (OR 30-40). By an amendment and supplement McCarthy sought judgment against Wynne in the amount of $8,155.59 (OR 40, 44).

Judgment of the District Court:

The case was referred to a Special Master who heard the evidence, made findings of fact and conclusions of law (OR 52-69). The Master found that there was delivered to McCarthy goods of the factory price of $35,333.95. The Speecial Master concluded that under the terms of the contract McCarthy was obligated to pay for all of the merchandise received. However, the Master allowed McCarthy certain credits based upon certain agreements which he found Wynne and McCarthy made during their negotiations to settle. Except for reduction in the amount found by the

Master to be due Wynne, the District Court approved the report and rendered judgment (OR 111). Both parties appealed to the Circuit Court of Appeals for the Tenth Circuit.

Decision of Circuit Court of Appeals:

In an opinion filed May 31, 1938, the Tenth Circuit Court of Appeals sustained all of the findings of fact made by the Special Master, except with respect to certain credits allowed McCarthy, but held that, because of the failure of the parties to agree upon the selection of the goods to be purchased and those to be held on consignment, the provisions of the contract with respect to paying certain percentages of the factory prices never became operative. The court further held, however, that by placing these goods in his stores, commingling them with other like goods, and offering them for sale in the usual course of trade, as the Master found he did, McCarthy converted the goods and was liable for the market value thereof upon an implied promise arising out of his conversion. 97 F. (2d) 964, 970.

The court directed that the judgment be vacated and that the cause be remanded "with instructions to permit Wynne to amend his petition and to proceed further in accordance with this opinion." (NR 13).

Proceedings Subsequent to Remand:

Thereafter Wynne filed an amendment to his petition paraphrasing the language of the Circuit Court of Appeals and alleging that the market value of the property delivered to McCarthy was $38,580.00; that McCarthy was entitled to credits "heretofore adjudged in his favor in the total sum of $12,814.10 and no more," and prayed judgment for $26,165.90 with interest and costs (NR 15).

Thereupon McCarthy filed an answer and counterclaim, not only to this amendment but to the plaintiff's petition as a whole, raising all of the issues that had been previously raised and decided by the Circuit Court of Appeals, and praying judgment against Wynne in the amount of $3,184.97 with interest (NR 16-22). At the same time, McCarthy filed a demand for a jury trial (NR 23).

Upon motions filed by Wynne, an order was made striking the answer filed by McCarthy, denying the demand for jury trial, and limiting the issues to be tried to the value of the property at the time of the conversion (NR 25).

McCarthy thereupon filed an answer to the amendment to the petition (NR 27).

Thereafter the case was tried before the District Court and judgment was rendered in favor of Wynne and against McCarthy for $13,150.95 with interest and costs (NR 28-30).

Second Decision of the Circuit Court of Appeals:

From this judgment McCarthy appealed to the Tenth Circuit Court of Appeals, where the judgment was affirmed, that court holding that the District Court had correctly interpreted its mandate in restricting the issues to the value of the property at the time of the conversion and that the trial court had properly denied McCarthy's demand for a jury trial (NR 179-184).

ARGUMENT.

Petitioners' asserted grounds for *certiorari* are *(1)* that the mandate of the Circuit Court of Appeals did not direct or authorize the restriction of the issues but that a new trial in all respects was required; *(2)* that, in any event, petitioners were entitled to a jury trial of the issues that were tried.

Our answer to these contentions follows. A summary of the argument will be found in the index.

POINT I.

The Circuit Court of Appeals, by its mandate, directed that the issues be restricted.

(a) ***The Circuit Court of Appeals has so said, and it is the highest authority with respect to the interpretation of its own mandate.***

Two district judges, upon due consideration of the mandate, reached the conclusion that the Circuit Court of Appeals did not direct that a new trial of all issues be had, but that only the question of the market value of the goods be determined (NR 25-26). The Circuit Court of Appeals affirmed (NR 184). The *power* of the Circuit Court of Appeals to direct that the issues be so restricted is undoubted, whether the action be regarded as one at law or in equity. (See authorities cited, *infra*, pp. 13-14.) Therefore, the question is merely one of *intention* of the appellate court. Inasmuch as that court has said that its intention was to restrict the issues, it is difficult to see what question remains for this court to decide or how any question of public importance can be involved.

(b) ***The case was originally tried, appealed, and decided by the Circuit Court of Appeals as an equity case. The mandate must therefore be interpreted as a mandate in an equity case.***

It is conceded by petitioners that this case as originally filed and tried was in equity. A formal agreement to that effect mas made (NR 8-10). The case was tried and appealed as an equity case, and the Circuit Court of Appeals filed its opinion and mandate without any suggestion that the case was not properly in equity (NR 11-14, 183; 97 F. (2d) 964).

In this situation the Circuit Court of Appeals was powerless to consider the appeal on its merits other than as an equity case, whether or not it was such in fact. *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684.

And the parties are estopped to question the equity jurisdiction. *Lyons Milling Co.* v. *Goffe & Carkener,* (C. C. A. 10) 46 F. (2d) 241.

The mandate was therefore issued and filed in an equity case and must be interpreted as mandates in equity cases are interpreted.

(c) ***In equity cases, new trials are not granted, the practice being to remand for further proceedings.***

On the first appeal the Circuit Court of Appeals, after summerizing the pleadings, the findings of the Master, and the judgment of the court, said:

> "To review the evidence would unduly extend this opinion. Suffice it to say, that the findings of fact made by the Special Master, except as to certain deductions credited to McCarthy, are fully supported thereby."

The deductions credited to McCarthy were the basis of respondents' appeal in Case No. 1638 in the Circuit Court of Appeals.

The judgment was vacated solely because under the facts found by the Special Master and approved by the trial court and by the Circuit Court of Appeals an erroneous measure of recovery was applied—and by the order remanding, the Circuit Court directed that Wynne be allowed to amend his petition to set up the market value of the property and that recovery be based on that value instead of a specified percentage of the factory prices as provided by the contract. The Circuit Court did not direct that a new trial be granted, but it directed that Wynne be permitted to "amend his petition and to proceed further in accordance with the opinion of this court" (NR 13).

To "proceed further in accordance with the opinion of this court" required that all findings of fact made by the Special Master (except certain deductions made in McCarthy's favor) be preserved, and that an additional fact be determined; namely, the market value of the property at the time of the conversion, and that judgment be rendered on such finding.

Not only has the Circuit Court of Appeals, on the second appeal, said that it intended by the language used in its mandate to direct that the issues be limited to a determination of the market value of the property, but the language of the court in its opinion and mandate is susceptible of no other construction, interpreted in the light of mandates in equity cases.

The rule against granting a new trial in equity cases is so firmly planted that even when the appellate court directs that a "new trial" be granted the mandate will be con-

strued to mean only that further proceedings be had in conformity with equity practice. This court so held in *The Board of Supervisors of Wayne County* v. *Kennicott,* 94 U. S. 498, and said, *inter alia:*

> "Technically, there can be no 'new trial' in a suit in equity; * * * ."

The whole subject of the interpretation of mandates in equity cases is covered by this court in *Gaines* v. *Caldwell,* 148 U. S. 228, and *Latta* v. *Granger,* 167 U. S. 81. Those cases construed a mandate issued in *Goode* v. *Gaines,* 145 U. S. 141, which was a suit to impress a constructive trust upon land and to require an accounting. This court approved the judgment in respect of the land but expressed dissatisfaction with the accounting and entered this order:

> "The decrees are severally reversed and the causes remanded to the Circuit Court, with a direction for further proceedings in conformity with this opinion, the costs of this court to be equally divided."

This court, in *Gaines* v. *Caldwell, supra,* held that this mandate was intended only to require further proceedings with respect to the matters about which the court had expressed its dissatisfaction, and that as to all other matters the judgment should be affirmed. The court said:

> "The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects. * * *
>
> "It is, we think, very plain that so much of the decree of the Circuit Court of November 11, 1887, as was not disapproved by this court still stands in full force."

This court granted a writ of mandamus in the above case, thus permitting a retrial of the question of accounting only.

The mandate in *Goode* v. *Gaines, supra,* was further limited by this court on a second appeal in *Latta* v. *Granger, supra,* where the court said that even with respect to the accounting the trial court was limited to that feature of the accounting about which the court expressed its dissatisfaction in its opinion, and that the whole subject of the accounting was not to be reopened. This court said:

> "The reversal of that decree amounted to nothing more than a vacating of the accounting so as to permit of a modification thereof in particulars pointed out with sufficient precision in the opinion, and it might well be held that the Circuit Court had no power, under our mandate, to again go into the questions of rental rate and value of improvements, for they have been determined, * * * ."

To the same effect see *H. P. Coffee Co.* v. *Reid, Murdock & Co.,* (C. C. A. 8) 60 F. (2d) 387, 388; *Ellis* v. *Reed,* (C. C. A. 9) 238 Fed. 341; *Mortgage Loan Co.* v. *Livingston,* (C. C. A. 8) 66 F. (2d) 636; *Harrison* v. *Clarke,* (C. C. A. 8) 182 Fed. 765.

PETITIONERS' AUTHORITIES DISTINGUISHED.

All of the authorities cited by petitioners under their Point E (petitioners' brief, pages 29-31) dealt with mandates issued by appellate courts in appeals of *law* actions.* Not one of them was in equity. Petitioners fail to take any

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*The quotation from 5 C. J. S. at page 1476 is inaccurate and incomplete in that the quotation shows the sentence to end with the quotation, whereas the sentence continues "except as restricted by the opinion of the appellate court." The importance of this omitted clause is shown by the decisions cited herein under Point I (c), *ante,* pages 11-14, and by *Gulf Refining Co.* v. *United States,* 269 U. S. 125.

cognizance whatever of the conceded fact that the mandate of the Circuit Court of Appeals was issued in an equity action, whatever the case may properly have been after the amendment pursuant to that mandate.

Moreover, the modern tendency even in law actions is to restrict the issues to be retried to the issues that were not properly determined. *May Department Stores Co.* v. *Bell*, (C. C. A. 8) 61 F. (2d) 830, 842, 843; *Mutual Life Insurance Co. of New York* v. *Sayre*, (C. C. A. 3) 81 F. (2d) 752; *Empire Fuel Co.* v. *Lyons*, (C. C. A. 6) 257 Fed. 890, 897, 898; *U. S. Potash Co.* v. *McNutt*, (C. C. A. 10) 70 F. (2d) 126.

Even though we consider the mandate as in a law action, the action of the Circuit Court of Appeals in restricting the issues to the value of the property was clearly justified. Unlike the situation involved in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, the issues of liability and amount of liability were clearly severable and distinct. There was no question but that McCarthy received a large amount of goods for which he had not paid. The Special Master, the trial court, and the Circuit Court of Appeals all agreed that he received the identical goods which were listed and described in a certain inventory made jointly by McCarthy and Wynne at the time the goods were unloaded from the freight cars (OR 62, Finding VIII). There was therefore no occasion to again retry the question of what goods were received. There was only one other question: What was the value of the goods?

The petitioners complain that they were not allowed to litigate the question of the date of the conversion, they saying that that question was material on the matter of interest. They also complain that there was no evidence of the date

of conversion on the second trial (petitioners' brief, pages 27-28). That question was determined by the Circuit Court of Appeals when it held that McCarthy converted the goods at the time he placed them in his stores and offered them for sale without selecting the goods to be purchased from those to be held on consignment. The finding of the Special Master, approved by the trial court and by the Circuit Court of Appeals, was that two carloads were shipped to McCarthy at Wortham, Texas, in the early part of January, 1925, and one carload was shipped to McCarthy at Vernon, Texas, on February 6, 1925 (OR 60). Another finding sustained by the trial court and by the Circuit Court of Appeals was that the "materials and supplies as received were immediately placed on sale in the stores of the defendant J. T. McCarthy, Jr. * * * " (OR 64).

The undisputed evidence is that after the last car was unloaded and on February 10, 1925, Wynne wrote McCarthy, requesting an appointment to finish the matter (OR 118), but that an audience with McCarthy was not obtained until May 15th of that year (OR 131). The trial court found that the goods were converted on or about February 15, 1925 (NR 28). That date was several days later than the uncontradicted testimony shows that the goods were placed in the stores and offered for sale, and, under the holding of the Circuit Court of Appeals, were converted.

The case of *Warner* v. *Godfrey*, 186 U. S. 365, cited by petitioners (Bf., p. 31) is not in point. McCarthy *was* allowed to defend against the new issue raised by the amendment. He did contest the market value of the property. The facts constituting his liability on the theory of conversion were found by the trial court and affirmed by the Circuit Court of Appeals. McCarthy did contest in the Circuit Court

of Appeals his liability on the theory of conversion on the facts thus found.

Point II.

The amendment pursuant to the mandate did not convert the case into an action at law. There was therefore no right to a jury trial.

(a) *The character of the action was not changed by the amendment. If the action was at law after the amendment, it was at law originally. Petitioners are therefore estopped by their agreement and by their conduct to assert that the action was at law.*

The case having been considered by the parties and the courts as an equity action, at least until the last amendment was filed, it is incumbent upon petitioners to show, not only that the action was one at law after the amendment, *but that it was not an action at law before.* In other words, if the action was not properly in equity before the amendment, petitioners waived any objection to equity jurisdiction, and they will not be permitted to avoid that waiver merely because an amendment has been filed *making a slightly different law action than it was before! Lyons Milling Co.* v. *Goffe & Carkener,* (C. C. A. 10) 46 F. (2d) 241.

A comparison of the issues before and after the amendment will reveal the frivolous nature of petitioners' contention. The many grounds of equity jurisdiction existing before and after the amendment are set forth under Point II (b), *post.* The only difference in the issues before and after was this: Before the amendment, respondents sought recovery of *specified percentages* of the *factory prices* of thousands of items of oil well supplies delivered to McCarthy under the terms of an express contract (OR 1-11, 26-29, 320-413). After the amendment, recovery was sought for

the *market value* of the same goods delivered under the same contract. Every other issue was identical.

The amendment was drawn on the theory that all issues other than the value of the property had been settled. It was couched in the language of the Circuit Court of Appeals. Credits were allowed McCarthy in the exact amount stated in the findings. Standing alone, the amendment presents a very simple issue. But if it stands alone, it is because the other issues were adjudicated, and, in that event, this is but a continuation of the same case and not a new trial. If the other issues have not been adjudicated, then the whole case, including the amendment, must be looked to in determining the nature of the case. So viewed, it is not apparent, and counsel for petitioners do not explain, how an adequate remedy at law existed after the amendment that did not exist before.

Counsel *assume* that because the Circuit Court of Appeals held that the express contract did not govern, the equity jurisdiction of the court failed. Counsel *assume* that the decision of that court that the property was converted precludes equitable relief. There is no basis for such assumptions.

It should be observed that paragraph 10 of the original petition on file at the time agreement waiving a jury was made (OR 8) alleged facts showing that McCarthy, on December 9, 1930, converted all of the goods remaining on hand at that time unsold and thereby became liable and bound to account to Wynne for the factory price thereof, as well as for that part of same which he had theretofore sold, if he was not bound by the contract to pay therefor. Thus, if a mere charge of conversion, irrespective of what else may be involved in the case, renders the action one at law,

the action was one at law at the time the agreement waiving a jury was made, and therefore the issues were not changed from an equitable action to a law action by the amendment.

No Distinction Between Express and Implied Agreements.

The Circuit Court said that Wynne might waive the tort and sue on McCarthy's implied promise to pay for the converted goods. The right to waive the tort and sue the tort-feasor in assumpsit or on account is established by numerous authorities. Note, 97 A. L. R. 251; *Guerini Stone Co.* v. *P. J. Carlin Constr. Co.*, 248 U. S. 334, 63 L. ed. 275, 284. And when suit is brought on the implied promise the case is governed by the same principles applicable to a suit on an express contract. Thus the claim may be pleaded as a counterclaim under a statute permitting a counterclaim only on a claim arising on contract. *Felder* v. *Reeth*, (C. C. A. 9) 34 F. (2d) 744, 97 A. L. R. 244; *Farmers' & Merchants' Natl. Bank* v. *Huckaby*, 89 Okl. 214, 215 Pac. 429. And see 1 C. J. S. 582.

Counsel for petitioners make much of the fact that the original suit was predicated on the written contract, whereas the liability of McCarthy was adjudged to be on an implied contract for the value of the property. In this, counsel merely *assume* that a suit upon an express contract is properly brought in equity, whereas a suit on an implied contract, arising out of conversion, must be in a court of law. Counsel cite no authorities to sustain this contention, and we know of none.

It should be observed also that Wynne's original petition did not seek to recover the contract price, but sought to recover the factory prices without the discounts provided by the contract (OR 7, paragraph 9). Thus, at no stage of

this case did Wynne seek to recover under the terms of the express contract—if that matters.

(b) *The issues, after the amendment, were cognizable in equity.*

The allegations made in the pleadings upon which the former trial was had are identical with the pleadings as amended, except that recovery by the amendment was based on the market value of each item instead of the factory prices. The items sued upon were identical; the facts giving rise to the action were the same; the only change was in one theory of law—the measure of the recovery.

There are five grounds for sustaining the equity jurisdiction after the amendment, without regard to the points hereinabove discussed. These reasons will now be enumerated:

(1) There existed between Wynne and McCarthy a fiduciary and a trust relation. McCarthy was trusted with Wynne's property with the privilege and duty of selecting the goods that he would purchase and those he would hold and sell on consignment. A fiduciary relation "arises wherever a trust, continuous or temporary, is specially reposed in the skill or *integrity* of another, *or* the *property* or pecuniary interest, in the whole or in a part, or the bodily custody of one person is placed in the charge of another." 25 C. J. 1119; *McKinley* v. *Lynch*, 58 W. Va. 44, 51 S. E. 4, 9 (Quoting 1 Bigelow on Frauds, p. 262); *Hivick* v. *Urschel*, 171 Okl. 17, 40 P. (2d) 1077-1080—holding that the assignee of an oil and gas lease, who was obligated to pay a bonus out of oil, occupied a fiduciary relation to the holder of the bonus. The relation of principal and factor is of a fiduciary character. 25 C. J. 342. *A fortiori* the placing of goods in possession of a person, who, under a contract, is to become

a factor upon his selecting the goods to be held on consignment, creates a fiduciary relation between the parties. The effect of this relation upon the nature of the suit as being one in equity will be seen from the authorities hereinafter referred to.

(2) Fraud was charged against McCarthy (OR 7). This alone is adequate ground for the interposition of equity.

In 19 Am. Jur., p. 63, the rule is stated as follows:

> "It frequently is said in a general way that ground for equitable relief exists in, or that chancery courts have jurisdiction over cases arising out of, fraud, misrepresentation, concealment, fraudulent suppression of facts, bad faith, or breach of trust. Indeed, the statement is recurrent that there is no other ground on which jurisdiction in equity is so readily entertained and freely exercised. The jurisdiction of equity over such cases is said not to be dependent on discovery."

(3) The petition was in the nature of a creditor's bill before judgment. It sought to reach property held by Meholin in trust for McCarthy (OR 10), a nonresident. This alone gave jurisdiction in equity. *Gaskins* v. *Bonfils,* (C. C. A. 10) 79 F. (2d) 352; *Williams* v. *Adler-Goldman Commission Co.,* (C. C. A. 8) 227 Fed. 374; *Johnston* v. *Byars State Bank,* 141 Okl. 277, 284 Pac. 862; *White Co.* v. *Finance Corp. of America,* (C. C. A. 3) 63 F. (2d) 168.

By stipulation and order of the court, certain funds due McCarthy and Meholin were impounded in lieu of the property attached and the funds reached by garnishment (OR 102, 104-106). Title to these funds was clouded because of Meholin's holding the legal title to the properties from which said funds were derived (OR 10, 105). The final judgment in this case directed that said funds be applied to the

payment of the judgment against McCarthy (NR 29). Thus, the creditor's bill feature of the petition was sustained. Meholin's interest in these funds was extinguished (NR 29). That was purely an equitable remedy. The mere substitution of the money for the property did not change the character of the suit. The question is whether at the time the suit was filed a case in equity existed. *Doak* v. *Hamilton*, (C. C. A. 4) 15 F. (2d) 774, 778.

(4) Mutual accounts were involved. Wynne sought to recover for the goods shipped. McCarthy sought to recover for goods returned to Wynne, and for commissions thereon (OR 39, 45). McCarthy sought to recover freight charges in moving property (OR 39, 43) and for taxes on the property (OR 39, 43) and for overpayment on goods purchased (OR 44).

The fact that mutual accounts were involved alone is ground for equity jurisdiction.

In *Kilbourn* v. *Sunderland*, 130 U. S. 505, 32 L. ed. 1005, the defendants had defrauded the plaintiffs while acting as their agents in purchasing and handling real estate. *Their misdeeds were torts* (53 A. L. R. 818) but the court held that equity had jurisdiction of an accounting suit where the remedy at law was embarrassed by fraud involving a fiduciary and trust relationship. We quote:

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. The parties stood in a fiduciary relation towards each other, and in the course of the transactions between them, from thirty to forty different lots of ground were bought for the complainants in upwards of fifteen distinct purchases. As to five of these purchases fraud is specifically

charged. A considerable amount of complainants' money was in defendants' hands, and a counterclaim was set up by them in relation to services performed in and about the care of a portion of the property purchased; services covering many payments for taxes, interest, etc.; making of loans and procuring renewals; receipts and advances. The transactions were all parts of one general enterprise, and the claims of a character involving trust relations. Before the severance of the connection between the parties, Kilbourn & Latta dissolved, and the amounts due from Kilbourn & Latta, if any, and from Latta alone, if any, to Sunderland and Hillyer or to Sunderland, and the offsets and counterclaims of Kilbourn & Latta, or of Latta, all sprang from one series of operations, and required an accounting on both sides; and that accounting, until disentangled by the investigation of the court, was apparently complicated and difficult. 'There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law' (1 Story, Eq. Jur., Sec. 450); and, as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the Supreme Court of the district in sustaining the jurisdiction."

The situation described in that case is strikingly similar to the one here involved—the fiduciary relation of the parties; the trust relation; a counterclaim was set up by petitioners in relation to services performed, taxes paid, freight paid, goods returned, over payment for goods received; "the transactions were all parts of one general enterprise"; "all

sprang from one series of operations and required an accounting on both sides."

(5) Aside from all other consideration, the account was long and complicated, and that fact alone sustains the equity jurisdiction. *Kirby* v. *Lake Shore & M. S. Railroad,* 120 U. S. 130. The pleadings disclosed (and the evidence emphasized) that the receipt, condition, and value of practically every one of the thousands of items involved in this case was disputed. The question of jurisdiction in equity of a case of this kind was carefully considered and the authorities exhaustively reviewed by the late Judge McDermott in *Goffe & Carkener* v. *Lyons Milling Co.,* (D. C. Kan.) 26 F. (2d) 801; affirmed on other grounds, (C. C. A. 10) 46 F. (2d) 241. We respectfully refer the court to that opinion for a review of the authorities on this question.

See also Pomeroy's Eq. Jur. (5th Ed.), Vol. 4, Section 1421; 7 Cyc. Fed. Proc., p. 2; *Fechteler* v. *Palm Bros. & Co.,* (C. C. A. 6) 133 Fed. 462; *McMullen Lumber Co.* v. *Strother,* (C. C. A. 8) 136 Fed. 295; *Hapgood* v. *Berry,* (C. C. A. 8) 157 Fed. 807; *Hattiesburg Lumber Co.* v. *Herrick,* (C. C. A. 5) 212 Fed. 834.

Point III.

The agreement between the parties waiving a trial by jury was binding to the end of the litigation. For that reason, also, the demand for a jury trial was properly denied.

We concede the general rule to be that an ordinary stipulation waiving a jury in a *law* action does not extend to a second trial after reversal and remand for a *new trial* by an appellate court (Petitioners' Bf., p. 32).

Here, however, no new trial was granted. The direction of the Circuit Court of Appeals was to take further evidence

and render judgment in accordance with the opinion of that court. No case has been cited to sustain the contention that under these circumstances petitioners were entitled to withdraw from the agreement waiving a trial by jury. There are cases, however, holding that under these circumstances a party may not withdraw from such an agreement. *Park* v. *Mighell*, 7 Wash. 304, 35 Pac. 63; *Raleigh Banking & Trust Co.* v. *Safety Transit Lines, Inc.*, 200 N. C. 415, 157 S. E. 62.

Moreover, even though it should be regarded that a new trial was granted in this case (contrary to the holding of the Circuit Court of Appeals), and that this was a law action, the agreement in this case waiving a trial by jury is distinguishable from an ordinary stipulation of parties waiving a trial by jury, and petitioners would not have been entitled to withdraw from their agreement to waive a jury.

In consideration of McCarthy's agreement to enter his general appearance in this case, waive a jury, and expedite the trial, Wynne agreed to dismiss a similar suit pending in the Eastern District of Oklahoma and withdraw his motion to remand this case to the state court, all of which he did. In the light of the history of this litigation as related in the statement of facts herein, it is manifest that the parties intended that the case should be finally concluded without the intervention of a jury. The difficulty of trial by jury, as demanded by McCarthy in the Texas case after the issues had been settled by a report of a Special Master, was the motivating cause for instituting this action in Oklahoma. Obviously, therefore, the parties intended by the stipulation to forever preclude the intervention of a jury in the trial of this action. This case is therefore distinguishable from the line of cases supporting the general rule that a stipulation waiving a jury is not binding on a second trial. The leading case supporting the general rule is *Burnham* v. *North Chica-*

go St. Ry. Co., (C. C. A. 7) 88 Fed. 627 (Petitioners' Bf., p. 33). The other cases either cite or follow a later one which cited this case as authority for the rule announced.

In the last paragraph of that opinion the court said:

> "Nor is this court ready to concede that the waiver of the right of jury trial is absolutely binding upon the party, even as to the one trial where it is intended to be applied. *A stipulation to waive, followed by an order of the court, is not in the nature of a private contract founded upon a consideration, which can only be set aside for fraud.* It is a proceeding in court, which is liable to be changed or modified or set aside by order of the court, in its discretion, upon a proper showing." (Emphasis supplied.)

This agreement to waive a jury is the very thing that the court said the stipulation there involved was *not!* This agreement *was* "in the nature of a private contract founded upon a consideration which can only be set aside for fraud." Under axiomatic principles, the reason for the general rule being inapplicable to the facts of this case, the rule itself does not apply.

We think counsel for petitioners are mistaken (Petitioners' Bf., p. 33) in saying that in the case of *Burnham v. North Chicago St. Ry. Co., supra*, the stipulation involved mutual agreements other than the waiver of jury trial. See the stipulation, 88 Fed. at page 627. It certainly is not that character of stipulation that is involved in this case. It is not the fact that the agreement waiving a jury trial was in writing that distinguishes it from the cases cited by petitioners. The distinguishing feature is the fact that the agreement was a private contract based on considerations other than the mutual agreement of the parties to waive a jury.

We also think counsel for petitioners are in error (Petitioners' Bf., p. 32) in saying that the Tenth Circuit Court

of Appeals cited *Park* v. *Mighell,* 7 Wash. 304, 35 Pac. 63, and *Raleigh Bank & Tr. Co.* v. *Safety Transit, Inc.,* 200 N. C. 415, 157 S. E. 62, in support of its conclusion that because the stipulation waiving a jury on the first trial contained other mutual stipulations constituting a consideration therefor McCarthy was not entitled to a jury trial. As we interpret the opinion, those cases were cited in support of the conclusion that McCarthy was not entitled to a jury trial because *further proceedings* had been directed, not a new trial. The authorities cited sustain that conclusion, and they are not in conflict with any of the authorities cited by petitioners (Petitioners' Bf., p. 32).

The Circuit Court of Appeals' statement that the agreement waiving a jury was not an ordinary waiver of trial by jury, but was in the nature of a private contract, is a distinction justified by the leading case of *Burnham* v. *North Chicago St. Ry. Co., supra,* which case was cited in our brief in the Circuit Court of Appeals.

It is submitted that the petition should be denied:

(1) Because the decision of the Circuit Court of Appeals is in accord with settled law and is not in conflict with the decision of any other Circuit Court of Appeals; and

(2) Because no question of general importance is involved.

Respectfully submitted,

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